SELANGOR PILOT ASSOCIATION v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Abdul Hamid J.) July 17, 1974]
[Kuala Lumpur — Civil Suit No. 1142 of 1972]

Constitutional Law — Act of Parliament prohibiting persons who are not authority pilots from acting as pilots in pilotage district — Whether Act ultra vires the Constitution — Whether there is compulsory acquisition of property — Federal Constitution, arts. 13 and 74.

In this case the plaintiffs asked for a declaration that they were entitled to compensation for the goodwill of their business which the first defendant, the Government of Malaysia on behalf of the second defendant, Lembaga Pelabuhan Kelang, by virtue of sections 29A and 35A of the Port Authorities Act, 1963 (added by the Port Authorities (Amendment) Act, 1972) deprived them by compulsorily acquiring the same. Alternatively, the plaintiffs asked for a declaration that section 35A of the Port Authorities Act is unconstitutional and is of no effect. The plaintiffs claimed that they had been carrying on the business of pilotage services within certain areas of the port and that as a result of the legislation they had been prohibited from carrying on their business within the pilotage district of the port.

Held: (1) in view of Article 74 of the Federal Constitution and in consideration of the matters in respect of which Parliament is empowered to legislate there is no validity in the plaintiffs' allegation that Parliament was incompetent to enact section 29A of the Port Authorities Act. Moreover, Parliament in enacting section 35A of the Act, had acted within the powers conferred by the Constitution when it imposed a prohibition directed to all persons other than the authority, against engaging in any pilotage act within the pilotage district;

(2) section 35A of the Act did not provide for the acquisition of property within the meaning of Article 13 of the Federal Constitution and there was therefore no liability on the part of the defendants to meet the claim made by the plaintiffs.

Cases referred to:-

(1) *France Fenwick* v. *The King* [1927] 1 K.B. 458 at p. 467.

(2) *Northern Ireland Road Transport Board* v. *Benson* [1940] N.I. 133 at p. 145 and 147.

CIVIL SUIT.

S. Sothi for the plaintiffs.

Abdullah Ngah (Senior Federal Counsel) for the first defendant.

Abdullah Yusof for the second defendant.

Abdul Hamid J.: The plaintiffs, Selangor Pilot Association (1946), claiming against the Government of Malaysia and Lembaga Pelabuhan Kelang, are asking for a declaration that they are entitled to compensation for the goodwill of their business which the first defendant on behalf of the second defendant, by virtue of sections 29A and 35A of the Port Authorities Act, 1963 [sections 5 and 6 of the Port Authorities (Amendment) Act, 1972], deprived them by compulsorily acquiring the same.

Alternatively, the plaintiffs are asking for a declaration that section 35A of the Port Authorities Act, 1963 (hereinafter referred to as "the Act") is unconstitutional and of no effect.

The material facts insofar as they are not in dispute are as follows —

The plaintiffs carried on business of pilotage services within certain areas at the port. In exercise of the powers under section 29A of the Act the second defendant declared certain areas to be port's pilotage district [G.N. 1215 *Government of Malaysia Gazette* dated 13th April 1972]. The areas declared cover all the areas within which the plaintiffs operated their business. By reason of the declaration the plaintiffs had to cease pilotage services within the area declared. The plaintiffs were informed of the taking-over of and the second defendant did take over the pilotage services with effect from May 1, 1972.

The plaintiffs' material assets and launches were purchased by the second defendant. It is the plaintiffs' allegation that the defendants refused to pay them compensation for the goodwill of their business and for their loss of future profits.

The defendants deny that any compensation was due and payable to the plaintiffs in respect of goodwill and/or loss of future profits.

Sections 29A and 35A of the Act [Sections 5 and 6 Port Authorities (Amendment) Act, 1972] are as follows —

"29A (1) The authority may from time to time by notification in the Gazette declare any area in the port or the approaches to the port to be a pilotage district.

(2) Every such declaration shall define the limits of the pilotage district.

"35A (1) Any person who, not being an authority pilot, engages in any pilotage act or attempts to obtain employment as a pilot of a vessel entering or being within any pilotage district shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(2) Any person or owner of a ship entering or being within any pilotage district who knowingly employs as pilot any person who is not an authority pilot shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(3) For the purposes of this section an authority pilot acting beyond the limits for which he is licensed or in contravention of any conditions imposed under the provisions of section 29H, shall be deemed not to be an authority pilot.

(4) Any person may, without subjecting himself or his employer to any penalty, act as the pilot of a vessel entering or leaving any pilotage district when such vessel is in distress or under circumstances making it necessary for the master to avail himself of the best assistance that can be found at the time."

I shall first of all deal with the alternative allegation. In support of their contention the plaintiffs argued that by reason of section 35A of the Act and the declaration made in the gazette notification, they had to cease business to make way for the second defendant to exclusively perform the pilotage services. They also argued that this provision offends Article 13 of the Federal Constitution as it not only empowered the second defendant to carry on business in the area declared but also prohibited others from carrying on the same business. The aim and effect of the legislation was therefore directly or indirectly, to take away the right of the plaintiffs to secure income from their business.

The plaintiffs further argued that they have been deprived of their property and that the law under which such deprivation was effected had not made provision for adequate compensation as required by Clause (2) of Article 13. They submitted that the legislation complained of is colourable and a fraud on the Con-

stitution in that, while purporting to do one thing or another, it is in effect acquiring the plaintiffs' business or goodwill or the right to carry on business without payment of compensation.

The question at issue here is whether section 35A of the Act is *ultra vires* and of no effect. This section provides penalties as to employment of pilot other than authority pilot. The object is to prohibit other persons other than authority pilots to perform any form of pilotage services within pilotage district declared under section 29A. By virtue of section 29C the authority is empowered to employ pilots for pilotage services. To determine whether a statutory provision is *ultra vires* and of no effect it is incumbent upon this court to consider the relevant law which purports to confer power upon the law-making body to enact such provision. Clause (1) of Article 74 of the Federal Constitution which deals with the power of Parliament to legislate refers to the Ninth Schedule where under item 9 Parliament is empowered to legislate in regard to shipping and navigation and that includes matters relating to ports and harbours. The Act which provides for the establishment of port authorities, the functions of such authorities and matters connected therewith was in fact enacted pursuant to those provisions in the Constitution. The function of the authority is to operate and otherwise maintain the port in respect of which it is established and the authority is given the power amongst other things to construct and maintain and operate vehicles for the purpose of towing and rendering assistance to any vessel whether in territorial waters or high seas and whether entering or leaving the port bound elsewhere. One of the specific duties of the authority, in discharge of its functions, is to maintain and provide maintenance of adequate and efficient port service consistent with best public interest.

A port is vital to the economy of any country. It is an important gateway where international ships may call to load and unload their cargo. There is therefore a necessity to vest with a port authority the necessary power to enable it to provide and maintain not only efficient handling of cargoes but also to provide and maintain efficient services to ships calling at the port.

In the light of the object of the Act and by reason of the nature of the duties imposed upon the port authority under the Act, it is abundantly clear that the amendment was aimed at providing further and better facilities consistent with best public interest. The power conferred upon the authority to employ pilots was to enable it to promote more efficient service. It is plainly spelt out in section 29C that "The authority may employ such number of pilots as it deems necessary or expedient for the purpose of providing an adequate and efficient pilotage service."

It might be convenient at this point to state that the plaintiffs had at no time challenged the validity of the provisions that conferred additional function upon the authority to provide pilotage services within limits of and the approaches to the port [Section 3(3) of the Act as amended by Act 99/72 w.e.f. 1.4.72]. Furthermore they have not challenged Parliament's legislative competency to enact section 29A of the Act. After careful analysis I am satisfied that in view of Article 74 of the Federal Constitution and in consideration of the matters in respect of which Parliament is empowered to legislate there is no validity in the plaintiffs' allegation that Parliament was incompetent to enact these provisions. I am also satisfied that Parliament, in enacting section 35A of the Act, had acted within the power conferred by the Constitution when it imposed a prohibition, directed to all persons other than the authority, against engaging in any pilotage act within the pilotage district.

I shall now turn to consider whether there was, expressly or impliedly, any compulsory acquisition of the plaintiffs' property. It is submitted by counsel for the defendants and indeed I agree, that the plaintiffs have not by virtue of these provisions been completely restrained from pursuing their vocation. They were only prevented from carrying on their business operation within the area declared. Pilots employed by or partners of the Association are not prevented from engaging in pilotage services in other areas by virtue of the licences granted to them under the Merchant Shipping Ordinance, 1952. It would seem to me that, in short, the plaintiffs' complaint, if any, is essentially in regard to the prohibition imposed by law. The question therefore is whether, on a proper construction, such prohibition would constitute an acquisition under Article 13 of the Federal Constitution. In my judgment such prohibition cannot be construed to constitute acquisition or use of property as contemplated by Clause (2) of Article 13 of the Constitution.

Counsel for the defendants cited to me the case of *France Fenwick* v. *The King*.[1] In that case the question of the Crown's common law right to interfere with a subject's property without paying compensation was considered and Wright J. in his judgment said —

> "In the cases cited in argument the matter has been discussed by high judicial authority, and I do not think it necessary to express any opinion of my own, but I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. I think, however, that the rule can only apply (if it does apply) to a case where a property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State."

Although the right to compensation has, in the instant case, to be considered in the light of Article 13 of the Federal Constitution a distinction ought, I think, to be drawn between a mere negative prohibition of the enjoyment of property and actual taking of owner's property for Government or semi-Government purposes. In the case of the former the question of compensation cannot be said to arise. As for the present case I am of the opinion that the law in imposing a prohibition against any person engaging in a pilotage act not being an authority pilot within certain area in the port and the approaches to the port would at most interfere with the plaintiffs' enjoyment of certain property, e.g. goodwill, if there is any, but cannot in any way be said to constitute any actual taking-away of such property.

It might be very useful to refer to the case of *Northern Ireland Road Transport Board* v. *Benson*[2] which, to my mind, seems to further fortify the defendants' contention that there had been no acquisition of property within the meaning of Article 13. In that case the Court of Appeal of Northern Ireland considered the validity of section 15(1) of the Road and Railway Transport Act (Northern Ireland) 1935. This section reads —

"A person other than the Board shall not use a motor vehicle on any public highway for the conveyance of their passengers or their luggage or the carriage of merchandise for hire or reward except with the consent in writing of the Board and approval of the Ministry of Home Affairs."

The Act was challenged as being *ultra vires* the Parliament of Northern Ireland having offended section 5 of the Government of Ireland Act which reads —

"In the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to take any property without compensation."

Andrew C.J. in the course of his judgment said —

"There is in my judgment a fundamental and well recognised distinction between taking or authorising property to be taken without paying compensation, this involving an actual use or taking of property into possession, and a negative or restrictive provision which merely involves interference with the owner's enjoyment of property."

"This principle appears to me to be directly applicable to the present case. Section 15(1) did not either expressly or impliedly transfer the possession or ownership of the goodwill of the undertaking from the defendant to the Board. It did not effect a 'taking' of the goodwill."

"Section 15(1) in my opinion amounted at most to a mere prohibition, or, as I would prefer to call it, in the words of the marginal note, a 'restriction' as to the user for certain purposes of motor vehicles for reward upon the public highway — an interference with the full enjoyment of property."

In the light of my findings I do not find any further necessity to determine whether "property" under Article 13 includes "goodwill."

For these reasons I would once more emphasize that there are no grounds to support the plaintiffs' contention that section 35A of the Act is unconstitutional and of no effect. I would also hold that in the instant case there was no acquisition of property within the meaning of Article 13 of the Federal Constitution.

It is my judgment that there is no liability on the part of the defendants to meet the claim made by the plaintiffs. The claim is therefore dismissed. The plaintiffs shall pay costs to both defendants.

Claim dismissed.

Solicitors: *K. Y. Foo & Co.; Tunku Zuhri, Manan & Abdullah.*

SHEIKH AMIN BIN SALLEH v. CHOP HUP SENG

[O.C.J. (Gill C.J.) July 21, 1974]
[Muar — Civil Suit No. 10 of 1971]

Torts — Damage by fire — Negligence — Nuisance — Rule in Rylands and Fletcher — Damages.

The plaintiff was the owner of a piece of land on which was a wooden bungalow, in which he lived. The plaintiff also built 8 terrace houses on his land, four of which were rented by the defendants. The defendants built a big brick oven at the back of two of those premises and also made alterations so as to form the four houses into one unit. The defendants used the premises for the purpose of a bakery and this fact was known to the plaintiff. A fire broke out in the premises and this resulted in the total destruction of the eight terrace houses. The plaintiff claimed damages for loss arising from the outbreak of the fire on the allegation that the fire started from the defendant's oven.

Held: (1) on the facts, it would seem clear that the only place where the fire could have started was the defendant's oven;

(2) there was ample evidence in this case to show that the plaintiff assented to or acquiesced in the use of the defendant's premises as a bakery with an oven therein and therefore the defendants could not be held liable in damages under the rule in *Rylands* v. *Fletcher;*

(3) there was no evidence in this case that the defendants had caused or permitted to exist on their premises a source of fire danger constituting a material injury to the plaintiff's property and therefore the plaintiff's claim on the basis of nuisance must fail;

(4) in all the circumstances of this case, the failure of the defendants to have someone to keep watch over the premises until the fire had been put out or extinguished itself was sufficient evidence of negligence and therefore the defendants were liable in damages on the basis of negligence;

(5) the measure of damages in the present case would be the cost of rebuilding the eight houses within a reasonable period after their destruction bearing in mind that it was the duty of the plaintiff to minimise the damages.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.
(2) *Read* v. *Lyons* [1947] A.C. 156, 183.
(3) *Overseas Tank Ship (U.K. Ltd.)* v. *The Miller Steamship Co. Pty. Ltd.* [1967] 1 A.C. 617.
(4) *Hiap Lee (Chong Leong & Sons) Brickmakers Ltd.* v. *Weng Lok Mining Co. Ltd.* [1974] 2 M.L.J. 1.
(5) *Leong Bee & Co.* v. *Ling Lan Rubber Works* [1970] 2 M.L.J. 45, 46.
(6) *Goldman* v. *Hargrave* [1967] a A.C. 645, 663.

CIVIL SUIT.

Goh Bin Lay for the plaintiff.

Keith Sellar for the defendant.

Gill C.J.: The plaintiff in this action is the owner of a piece of land in the Mukim of Simpang Kanan in the locality of Bukit Desir, Batu Pahat, which he purchased in 1955. There is a wooden bungalow on the land in which he lives. In or about the year 1961 he built on the land six wooden single storey terrace houses in a row adjoining one another, which were numbered as units A, B, C, D, E and F. A year or two later he built two more wooden terrace houses adjoining the existing row of terrace houses which were numbered as units G and H.

The defendant firm owns a large biscuit factory in the same vicinity on the main road opposite the road leading to the 8 terrace houses. On 1st May 1961 the defendants rented unit F from the plaintiff and built therein an oven for baking bread and cakes.